

Exhibit 330

United States of America ex rel. Ven-A-Care of the Florida Keys, Inc., et al.
v. Dey, Inc., et al., Civil Action No. 05-11084-PBS

**Exhibit to the August 28, 2009 Declaration of Sarah L. Reid in Support
of Dey's Opposition to Plaintiffs' Motion for Partial Summary Judgment**

NO. GV002327

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THE STATE OF TEXAS) IN THE DISTRICT COURT
 ex rel.)
 VEN-A-CARE OF THE)
 FLORIDA KEYS, INC.,)
 Plaintiff(s),)
)
 VS.) TRAVIS COUNTY, TEXAS
)
 DEY, INC.; ROXANE)
 LABORATORIES, INC., WARRICK)
 PHARMACEUTICALS CORPORATION,)
 SCHERING CORPORATION,)
 SCHERING-PLOUGH CORPORATION,)
 LIPHA, S.A., MERCK-LIPHA,)
 S.A., MERCK, KGAA, and EMD)
 PHARMACEUTICALS, INC.,)
 Defendant(s).) 53RD JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION OF
 ROBERT ELLIS
 February 10th, 2003

ORAL AND VIDEOTAPED DEPOSITION OF ROBERT ELLIS,
 produced as a witness at the instance of the
 Plaintiff(s), and duly sworn, was taken in the
 above-styled and numbered cause on February 10th,
 2003, from 9:13 a.m. to 5:36 p.m., before Cynthia
 Vohlken, CSR in and for the State of Texas, reported
 by machine shorthand, at the offices of Cotchett,
 Pitre, Simon & McCarthy, 840 Malcolm Road, Suite 200,
 Burlingame, California pursuant to the Texas Rules of
 Civil Procedure.

A P P E A R A N C E S

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 Mr. Richard Rienstra, Videographer
 Ms. Judy Schlup

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2	67
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EXHIBITS

NO. DESCRIPTION	PAGE
476	45
Cromolyn Sodium Nebulizer Solution Marketing Plan	
477	57
July 21, 1992 Memo from Rob Ellis to NPCC	

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1 Q. Termier?

2 A. Yes, that's right. That's right.

3 Q. Did you interview with Mr. Rice?

4 A. No, not at that time, no.

5 Q. And what was your first job title?

6 A. Marketing assistant.

7 Q. And did you get subsequently promoted while
8 you were at Dey?

9 A. I was promoted to a product manager
10 approximately two years later.

11 Q. Approximately March of '94?

12 A. Sounds about right.

13 Q. Roughly?

14 A. Yeah. I'm not sure of the exact date.

15 Q. To product manager, I'm sorry, is that
16 correct?

17 A. Yes, product manager, that's right.

18 Q. What were your duties and responsibilities as
19 a marketing assistant?

20 A. More or less just helping out on the
21 marketing side, doing everything that Helen asked me.
22 I did a lot of collateral development, sales
23 collateral development, did some sales training, did
24 various print jobs. One of my first projects was just
25 to -- to research the reimbursement status of Medicare

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1 and Medicaid, put together that database.

2 Q. Tell me about that, please. Who assigned
3 this project to you?

4 A. That was Helen. It was something that I
5 believe they had started before, but something they
6 put me on right away is just call all the state
7 agencies and record what their reimbursement
8 structures were and then assemble a database that we
9 had that for referral.

10 Q. And did you do that, did you assemble this
11 database?

12 A. Yeah, I guess I did.

13 Q. What was the name of that database?

14 A. I don't think I gave it a name. It was just
15 a database of information. Probably the Medicare or
16 Medicaid database is what we generally referred it
17 to -- referred to it as.

18 Q. And this is a database that was on the
19 mainframe at Dey?

20 A. No. No. It was -- simply I think I just put
21 together an Excel spreadsheet, you know. For
22 instance, Arkansas, reimbursement structure, whether
23 they reimbursed for generics or Albuterol at the time.

24 Q. Would this have been on your computer system
25 at Dey, just on --

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1 A. Yeah, it started on my computer system.

2 Sure.

3 Q. Would it have been accessible by everyone
4 else in the organization or in the alternative if
5 someone else wanted to access it would they have to
6 come to you and you could access it on your computer?

7 A. They -- at that time they would have to come
8 to me. I didn't make it generally accessible. It was
9 just on my computer. I don't think we -- I was tied
10 into any -- any local network at the time.

11 Q. Was it multi-pages or just one page, do you
12 recall?

13 A. You know, I'm not sure. I'm not sure. I
14 really don't -- I don't recall that.

15 Q. But the task was to -- to call the various
16 states and identify whether or not they were
17 reimbursing for Dey's products?

18 A. Uh-huh. To find the states that didn't and
19 actively seek reimbursement for Albuterol.

20 Q. Were you also determining what their
21 reimbursement formula was, for example, AWP minus
22 or --

23 A. Absolutely.

24 Q. -- wholesale cost plus?

25 A. I'm sorry. Yeah. That was the -- that was

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1 the main objective of the project.

2 Q. Did you understand why that was important to
3 Dey's managers?

4 A. No, not at the time. I didn't have a clue.
5 It was just my very first project, so I dug in.

6 Q. As you dug in and started executing the task
7 that was given to you did you come to an understanding
8 as to why that information was important to Dey?

9 A. Eventually, yes. I -- I completely
10 understood the reimbursement structures and -- and how
11 it drove generic substitution business.

12 Q. And what is the understanding that you came
13 to as far as the reimbursement and how it drove
14 generic substitution business?

15 A. Pharmacists, retail pharmacists are
16 reimbursed based on the formula AWP minus 30 percent
17 whatever the state does, so if that's -- if that's
18 financially rewarding to them and incentivizes them to
19 make that substitution over the brand.

20 Q. And when you're talking about competition
21 between generics, did you understand that your
22 customers, your pharmacy customers were also
23 interested not in competition versus the brand, but in
24 competition among generics, did you understand that
25 your customers, your pharmacy customers were also

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1 distributed them?

2 A. Yes, they did.

3 Q. Okay. Going back to this meeting that you

4 recollect where you were discussing pricing for

5 Cromolyn at or about -- actually prior to the launch,

6 did I understand that this was a meeting where

7 Mr. Mozak presided, Ms. Daulong was present,

8 Ms. Burnham was present, Susan Schnars was present and

9 you-all were discussing what to set the AWP and WAC
10 prices for Cromolyn?

11 A. That's right.

12 Q. As well as the published price to retail

13 generic distributors; is that right?

14 A. That's right. We were setting all the prices

15 for all our price lists.

16 Q. And --

17 A. All our class of customers.

18 Q. All your classes of trade. Okay. And did

19 you have a contribution to this meeting where you were

20 making a recommendation or were you there simply to

21 listen and take notes and observe?

22 A. As best I remember I came -- I was the one

23 that prompted the meeting, asked everybody to

24 participate. And I had some pricing recommendations

25 that I presented, but the meeting was immediately

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1 directed by Bob Mozak, who went to the board and

2 started discussing prices, and I think everyone else

3 just became observers at that point and Helen and Bob

4 decided what the prices were going to be.

5 Q. And in your experience working at Dey the --

6 the two -- two and a half years that you were there

7 who was the ultimate authority in deciding what prices

8 would be?

9 A. Bob Mozak.

10 Q. You mentioned that you brought some

11 recommendations to this particular meeting as to what

12 the AWP should be and the WAC prices should be; is

13 that right?

14 A. What all our prices should be, yeah.

15 Q. Okay. What -- what informed your

16 recommendation? Where did you get the idea and how

17 did you come up with the recommended pricing that you

18 presented to this meeting?

19 A. I mostly followed what our -- our past

20 history was on pricing and made any final tweaks based

21 on Cromolyn relative to Intal, which was the brand at

22 the time, and how we would relate to that. Because we

23 were the sole generic at the time.

24 Q. Who manufactured Intal?

25 A. That was Fisons.

1 Q. Pfizer?

2 A. Fison.

3 Q. Fison.

4 A. F-i-s-o-n.

5 Q. F-i-s-o-n; is that right?

6 A. That's right.

7 Q. And so you say you followed your -- your

8 established procedure for -- if I understood you

9 correctly, when you were selecting your

10 recommendations for AWP and for wholesale acquisition

11 cost and for the other prices to classes of trade you

12 followed an established procedure; is that right?

13 A. No.

14 Q. I'm sorry.

15 A. There was no established procedure. I was

16 basing my recommendations off what our historical

17 pricing was relative to each other -- relative to each

18 class of trade. I was making an attempt. I really

19 didn't have much idea what I was doing, but I was

20 trying to be proactive in -- in guiding this process

21 forward.

22 Q. Okay. So you were looking at what your

23 historical prices had been for other products, is that

24 right, since -- you're now talking about Cromolyn,

25 which is going to be a new product, correct?

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1 A. That's right.

2 Q. So you are looking at your prices, your AWP

3 prices, your WAC prices, your prices to retail generic

4 distributors for Albuterol; is that correct?

5 A. That's right.

6 Q. Okay. And you're using that as sort of a

7 benchmark to -- to make your recommendation for the

8 Cromolyn prices?

9 A. Yes, that's right.

10 Q. Okay. Were you also looking at the published

11 prices that Fison had -- had put out on the

12 marketplace for Intal?

13 A. Yes.

14 Q. Okay. And is there a relationship between

15 what their prices are and where you want to set your

16 AWP for your first generic?

17 A. Yes. Yes. I know through discussions that I

18 had with Helen and her discussions with First DataBank

19 that you had to be at least 10 percent, just -- just a

20 hair above 10 percent below the AWP on the brand to be

21 labeled as a generic by First DataBank. So that was

22 your ceiling price you could have on AWP and that was

23 really your starting point from deriving the rest of

24 your pricing.

25 Q. Okay. So you would have looked at what

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1 price reporting services while you were with Dey on
 2 its generic products?
 3 A. Changes in its WAC?
 4 Q. Yeah, in its WACs.
 5 A. Yeah, I think so. We had price changes, yes.
 6 Q. And tell the jury what happened to those
 7 prices when you reported them year after year to the
 8 price reporting services?
 9 A. Our WAC price? I think our WAC prices went
 10 down.
 11 Q. You can't recall a single situation in which
 12 your WAC prices went up, can you?
 13 A. No.
 14 Q. Not a -- not a one.
 15 A. No.
 16 Q. And so that -- for those states that were
 17 using Dey's WAC as a component of the reimbursement
 18 formula, the WACs that Dey was reporting to the price
 19 reporting services, as you understood, were going
 20 down.
 21 A. That's right.
 22 Q. And this is consistent with what you
 23 understood management's directive to you to be because
 24 you were simply doing a ministerial task. You were
 25 taking the prices you were given and reporting those,

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1 correct?
 2 A. That's right.
 3 Q. You weren't -- you weren't creating the
 4 prices, were you?
 5 A. No. No.
 6 Q. Now, would it surprise you if I told you that
 7 one of your colleagues reported outlandishly high WACs
 8 on one occasion to a price reporting service or
 9 multiple price reporting services in 1995 that were
 10 completely inconsistent with Dey's internal WAC
 11 prices?
 12 A. I would be very surprised.
 13 MR. WINTER: Objection, form.
 14 Q. (BY MR. FLECKMAN) Say that -- he talked over
 15 you. What did you say?
 16 A. I said I would be very surprised.
 17 Q. Okay. Would that be -- if that occurred
 18 would that be consistent with anything you know about
 19 the policies of Dey or would it be inconsistent with
 20 what you know about the policies of Dey while you were
 21 there?
 22 A. Completely inconsistent.
 23 Q. Did you ever see a memo circulated to you
 24 telling you that one of your colleagues intended to
 25 jimmy up the prices reported on WAC to the reporting

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1 services on Albuterol?
 2 A. I don't remember that.
 3 Q. If you had seen a memo which purported to
 4 report prices 40 to 50 percent higher than your
 5 current WACs on those Albuterol products to the price
 6 reporting services, would you have taken note of that
 7 as a member of the marketing department?
 8 A. I would ask them, yeah, I probably would ask
 9 them why are we doing that.
 10 Q. And that never occurred?
 11 A. I don't recall it happening.
 12 Q. It's going to take me a second, but I want to
 13 find this. The -- I'm going to ask you not -- I'm
 14 just going to show you the second page of this
 15 document.
 16 MR. FLECKMAN: Actually, Ray, do you
 17 have the exhibit, I hate to introduce it yet again, do
 18 you have the exhibit that we previously used --
 19 MR. WINTER: You're looking for Helen's
 20 memo?
 21 MR. FLECKMAN: No. I'm actually looking
 22 for one page which is a fax. I think I'll just do it
 23 this way.
 24 Q. (BY MR. FLECKMAN) Let me -- let me hand you
 25 a page which I'm going to mark Exhibit 482 and I'm

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1 going to represent to you that I have detached this
 2 from another page to which it is appended as an
 3 exhibit in this particular case.
 4 A. Okay.
 5 Q. But I want to show it to you because I want
 6 to ask you have you any recollection of seeing those
 7 WAC prices for those products, and I will represent to
 8 you that at the time that fax was sent to First
 9 DataBank Dey's WAC for the Albuterol products was not
 10 24.75 for the 25's but rather \$14.50 for the 25's, and
 11 I will tell you that Lou Barricelli has been asked and
 12 he didn't see it, Rick Upp has been asked, he didn't
 13 see it, Mary Anderle has been asked, she doesn't
 14 recall it, Todd Galles has been asked, he doesn't
 15 recall it and I'm now asking you do you recall it?
 16 A. No. No.
 17 Q. Now, let me show you a memo, let me just ask
 18 you, if Dey's WAC was \$14.50 on that Albuterol 25's
 19 would Dey have authorized you or anyone else as far as
 20 you know and as far as your experience at Dey went to
 21 report this inconsistent price to the reporting
 22 agencies or to any Medicaid authority?
 23 A. No. No.
 24 Q. Okay. Let me show you what has been marked
 25 as Exhibit -- well, before I do that, let me just read

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1 something to you. The -- do you agree or disagree
 2 with this statement: "WAC is not representative of
 3 our published wholesale list prices." Do you agree or
 4 disagree with that statement? "WAC is" --
 5 A. I disagree.
 6 Q. You disagree. Do you strongly disagree?
 7 A. Yeah. WAC -- WAC represents our published
 8 prices.
 9 Q. Your published wholesale list prices?
 10 A. Our published wholesale list prices.
 11 Q. Okay. Let me hand this to you. I'll
 12 represent to you that there's a good deal of
 13 controversy over whether this memorandum was
 14 distributed as it purports to have been distributed at
 15 this time and I'll ask you do you recall ever setting
 16 eyes on this memoranda before today?
 17 A. No. No.
 18 Q. Let me ask you to turn with me to your
 19 December -- you can set that aside. Thank you, sir.
 20 By the way, you worked for Helen Burnham, correct?
 21 A. That's right.
 22 Q. In 1995 you still were supervised by Helen
 23 Burnham, correct?
 24 A. That's right, yeah.
 25 Q. And she never had a discussion with you about

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1 that memorandum, did she?
 2 A. No. No.
 3 Q. Now, she claims that she was authorized at
 4 Dey to report these fake prices to First DataBank.
 5 MR. WINTER: Objection, form.
 6 Q. (BY MR. FLECKMAN) But I understood that you
 7 and Todd Galles and Eve were the ones who typically
 8 reported prices to the pricing reporting services.
 9 A. That's right. Helen was never involved in
 10 that.
 11 Q. Let me ask you to turn to Exhibit 476.
 12 Before we actually get into this exhibit, as you sit
 13 here today would you -- did you like Helen Burnham?
 14 A. To begin with.
 15 Q. Okay.
 16 A. Not in the end.
 17 Q. Okay. What was it about the process of your
 18 experience working for Ms. Burnham that antagonized
 19 you?
 20 A. Oh, it was a slow evolution over the, what,
 21 three and a half years that I was there. I don't
 22 think she -- she --
 23 Q. They can't hear you. If you --
 24 A. I'm sorry. I don't think -- the problem I
 25 had is I don't think Helen fairly represented what I

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1 want to say Todd, me and Eve were really doing in
 2 marketing to upper management. I think she -- she
 3 took -- she put her own interpretation on things when
 4 she presented it to management.
 5 Q. Did you feel that she was not in all respects
 6 entirely truthful about what she reported to upper
 7 management in the way she characterized the marketing
 8 activities and efforts?
 9 A. No. Helen -- Helen and I had one incident
 10 that probably started our road south where I lost
 11 confidence in her.
 12 Q. Okay. How did you lose confidence in her or
 13 trust in her?
 14 A. There was one time that she came to me she
 15 asked me to call the product manager for Ventolin and
 16 actively come to agreement on what prices should be.
 17 Q. When was that?
 18 A. That was during the course of my employment
 19 there.
 20 Q. Did she indicate to you that anybody had
 21 directed her to do that or did it seem to you that she
 22 was doing this of her own accord?
 23 A. It seemed to me she was trying to catch me
 24 off guard because I was still young at the time and I
 25 wouldn't know that that was wrong and she was trying

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1 to get me to do it and I said flat out no, that that's
 2 price fixing. I can't do that. And she just kind of
 3 said, "Oh, okay."
 4 Q. And she just dropped the subject.
 5 A. Yeah.
 6 Q. Did she ever raise it with you again?
 7 A. No. No.
 8 Q. The -- did you know that Helen had a strong
 9 animosity toward Charles Rice on a personal level?
 10 A. Yes. That was very apparent.
 11 Q. Okay. How did it manifest itself?
 12 A. Helen -- Helen was a very -- very strongly
 13 opinionated person and she would -- she would just
 14 interject her opinions and wasn't very professional in
 15 doing so at times.
 16 Q. Did you ever feel that -- well, tell me how
 17 it related to Charles Rice when you say that she had a
 18 strong -- let me not put words in your mouth. You
 19 tell how that -- what you've just related to us, how
 20 that had anything to do with Charles Rice in
 21 particular and her -- and her animosity toward him.
 22 A. Well, I can only speak to meetings where
 23 Charles and I and Helen were in the same meeting and
 24 she would -- she would take a bit of an aggressive
 25 stance in exerting her opinions. Even though Charles